

**OPINION
74-59**

February 14, 1974 (OPINION)

Mr. Donavin L. Grenz
City Attorney
Linton, ND 58552

Dear Mr. Grenz:

This is in response to your letter as City Attorney requesting our opinion on whether it is necessary for an alderman, whose term will not expire at the next municipal election, to resign before he can run for mayor or whether he can run and if elected, then resign his position as alderman.

You call to our attention Section 40-08-09 of the North Dakota Century Code, which provides:

"40-08-09. RESTRICTIONS ON MEMBERS OF COUNCIL. No member of the city council shall:

1. Be eligible to any other office the salary of which is payable out of the city treasury;
2. Hold any other office under the city government; or
3. Hold a position of remuneration in the employment of the city."

You state your conclusion as to the proper construction of this statute. You indicate certain members have requested that you obtain an opinion from us.

The statute is clear and specific, i.e., Subsection 2 prohibits members of the city council holding any other office under the city government, Subsection 1 makes members of the city council ineligible "to" any other office, the salary of which is payable out of the city treasury.

With specified exceptions city officers are required to take, subscribe and file their oath of office "within ten days after notice of his election or appointment has been given". (Section 40-13-03 North Dakota Century Code) The mayor holds his office for "four years and until his successor is elected and qualified." (Section 40-08-14 North Dakota Century Code) City council membership would thus have to be terminated "within ten days after notice of his election * * * has been given."

On such basis, and within the limits heretofore indicated, a member of the city council may run for the office of mayor. If the Legislature had wished to prevent any member of the city council from being elected to any other office, the salary of which is payable out of the city treasury, they would have substituted the word "elected" for the word "eligible" in subsection 1 of Section 40-08-09, or could have gone further and prohibited his campaigning for the office, or

in the manner of Section 39 of the North Dakota Constitution have prevented him from holding such other offices "during the term for which he was elected" as alderman.

We should mention that we do not find specific judicial precedent on this question under the North Dakota statute. We are enclosing, however, copies of prior correspondence of this office discussing the situation where as specifically provided for in the statutes, an alderman may become "acting" mayor, and considering an instance where the alderman had resigned his membership on the city council after completing his petition, but before the date of the election.

We hope the within and foregoing will be sufficient for your purposes.

Sincerely yours,

ALLEN I. OLSON

Attorney General